No. 22-2033

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY TERRELL MCGOWAN,

Plaintiff–Appellant,

v.

CELENA HERBERT, Lieutenant;
L. PAUL BAILEY, Sheriff, named as Paul Bailey,

Defendants–Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
No. 1:22-cv-852, Honorable Phillip J. Green

APPELLANT'S OPENING BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Appellant Anthony Terrell McGowan makes the following disclosure:

Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

Dated: January 23, 2023

By: /s/ *Evan Bianchi*
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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Anthony Terrell McGowan, through *pro bono* counsel, respectfully requests that this Court hold oral argument in this appeal. Because this Court would benefit from full adversarial briefing, Mr. McGowan, through counsel, also respectfully requests that this Court direct the defendants to appear and file a responsive brief. The defendants were not served in the district court because Mr. McGowan's complaint was dismissed at the screening stage under 28 U.S.C. § 1915A.

Oral argument and full adversarial briefing would serve this Court for three reasons. *First*, this appeal concerns the proper application of this Court's failure-to-protect standard, as recently articulated in *Westmoreland v. Butler County*. *Second*, the circumstances underlying Mr. McGowan's claim are likely to repeat themselves in other cases and this Court's guidance would promote uniformity in how the courts address such circumstances. *Third*, this appeal provides an opportunity for this Court to address how its mandatory leave-to-amend rule applies to complaints brought *pro se* by incarcerated plaintiffs that are dismissed *sua sponte* at the pre-service screening stage. This case is an ideal vehicle to address these issues because Mr. McGowan is proceeding with counsel.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Final judgment was entered on October 11, 2022. Judgment, R. 6, PageID # 53. Plaintiff–Appellant Anthony Terrell McGowan timely filed a notice of appeal on November 2, 2022, which was received by the district court and docketed on November 7, 2022. Notice of Appeal, R. 8, PageID # 59–62. This Court has jurisdiction over this timely appeal from a final judgment under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the district court err by concluding that Mr. McGowan did not state a failure-to-protect claim under *Westmoreland* and by focusing on inapplicable and irrelevant factors?

2. Did the district court err by requiring that Mr. McGowan allege that Ms. Herbert "acted intentionally to put him at a substantial risk of harm" to establish Ms. Herbert's deliberate indifference?

3. If the district court correctly applied *Westmoreland*, did it err by not allowing Mr. McGowan an opportunity to amend his complaint?

STATEMENT OF THE CASE

While awaiting trial, Anthony Terrell McGowan told officials at the Berrien County Jail that he would be attacked—or killed—if he was removed from protective custody. This was no empty plea: the very reason Mr. McGowan had been placed in protective custody in the first place was that other detainees had repeatedly threatened and physically assaulted him for "snitching" against Dwand Carter, who was convicted of a double homicide.

Yet, despite knowing this, Defendant–Appellee Celena Herbert, the Berrien County Jail classification officer, ignored Mr. McGowan's cry for help and removed him from protective custody. Less than a month later, Mr. McGowan was brutally assaulted by another detainee who knew that Mr. McGowan had provided testimony against Mr. Carter. The assault left Mr. McGowan with significant physical and emotional injuries that harrow him to this day. Mr. McGowan brought suit under 42 U.S.C. § 1983, alleging that Ms. Herbert's failure to protect him from the assault amounted to deliberate indifference under the Fourteenth Amendment.

I. Factual Background

Mr. McGowan is currently incarcerated as a pretrial detainee at Berrien County Jail, in St. Joseph, Michigan. Opinion, R. 5, PageID # 39. Before his incarceration, Mr. McGowan testified against Mr. Carter, who was tried by jury and convicted of a double homicide.[1] Complaint, R. 1, PageID # 3; Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10.[2] But, as Mr. McGowan soon learned, no good deed goes unpunished.

Mr. McGowan's involvement in Mr. Carter's conviction became common knowledge within Dorm 2-E, Mr. McGowan's housing unit at Berrien County Jail. Complaint, R. 1, PageID # 3; Complaint Ex. 2:

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[1] *See* Dwand Dontrell Carter, Michigan Department of Corrections, https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=415461 (noting that Mr. Carter was convicted of two counts of homicide, three counts of possession of a firearm(s) when committing or attempting to commit a felony, one count of possession of a firearm(s) by a convicted felon, and one count of carrying a concealed weapon(s)). This Court "may take judicial notice of generally known information or government websites." *Kentucky v. Biden*, 23 F.4th 585, 601 n.8 (6th Cir. 2022); *see also Broom v. Shoop*, 963 F.3d 500, 509 (6th Cir. 2020) ("This court and numerous others routinely take judicial notice of information contained on state and federal government websites.").

[2] Mr. McGowan attached eleven exhibits to his complaint. In reviewing a district court's dismissal of a complaint, this Court "may also consider documents attached to the complaint." *Nolan v. Detroit Edison Co.*, 991 F.3d 697, 707 (6th Cir. 2021).

McGowan Affidavit, R. 1-2, PageID # 10. Because of his testimony, Mr. McGowan was labeled a "snitch," leading to him being repeatedly assaulted by other Dorm 2-E detainees. Complaint, R. 1, PageID # 3–4; Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10.

Fearing for his safety, Mr. McGowan sought help. On April 22, 2022, he told a jail official, Deputy Zabel, that he needed to be moved from Dorm 2-E because he had been labeled a snitch. Complaint, R. 1, PageID # 3. Another official, Deputy Rankin, interviewed Mr. McGowan. *Id.* During that interview, Mr. McGowan said that he had been assaulted by detainees in Dorm 2-E for giving testimony against Mr. Carter. *Id.* Mr. McGowan was subsequently placed into protective custody by Ms. Herbert, who was the Berrien County Jail classification officer at the time. *Id.*; Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 22.

At the end of May, Mr. McGowan sent an affidavit to Ms. Herbert. Complaint, R. 1, PageID # 3. In it, Mr. McGowan "begged and pleaded" for Ms. Herbert not to remove him from protective custody. *Id.* He told Ms. Herbert that he had been "subjected to assaults daily" by other detainees in Dorm 2-E for "giving information . . . about a double murder" in Mr. Carter's case to the Berrien County Prosecutor's Office. Complaint

Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10. He also told Ms. Herbert that "everyone" in Dorm 2-E knew he "gave information on Carter," and that he would be "assaulted or killed" if he was removed from protective custody. *Id.*[3] The threat to Mr. McGowan's physical safety could not have been clearer: "Carter has put a price on my head." *Id.*

Ms. Herbert ignored Mr. McGowan's pleas for security. On June 13, Ms. Herbert forced Mr. McGowan out of protective custody, putting him back in Dorm 2-E. Complaint, R. 1, PageID # 4. Within a month, Mr. McGowan was severely beaten by a detainee who sought to avenge Mr. Carter's conviction.

The assault occurred on July 7, shortly after Mr. McGowan's attacker, Richard Hill, was put in the same Dorm 2-E housing unit as him. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 20. Mr. Hill accosted Mr. McGowan and asked him to identify the individual named Anthony McGowan. *Id.* When Mr. McGowan responded that he, in fact, was Anthony McGowan, Mr. Hill loudly said: "So you're the one

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[3] Mr. McGowan attached an incident report to his affidavit, in which jail officials recorded his statement that the detainees in Dorm 2-E "were saying he was a snitch." Complaint Exhibit 1: Incident Report, R. 1-1, PageID # 9.

who jumped on my man's Dwand Carter's case . . . and got him bound over on his double murder . . . ." *Id.* Trying to backtrack, Mr. McGowan denied his involvement in Mr. Carter's case and ran to his assigned cell—but Mr. Hill followed him. *Id.* In his cell, Mr. McGowan showed Mr. Hill an edited version of a newspaper clipping that covered Mr. Carter's case, to convince Mr. Hill not to attack him. *Id.*

But Mr. McGowan's side-step was not enough to throw Mr. Hill off his trail. Later that day, Mr. Hill asked Dean Bell—a detainee who had been assigned work privileges by Ms. Herbert—to retrieve court records confirming that Mr. McGowan testified against Mr. Carter. *Id.* at PageID # 20–21; *see also* Complaint, R. 1, PageID # 4. With permission from jail deputies, Mr. Bell secured records from Mr. Carter's case from another section of the jail and brought them back to Dorm 2-E, where he gave them to Mr. Hill. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 21; Complaint, R. 1, PageID # 4.

Upon reading the records, which established that Mr. McGowan had testified against Mr. Carter, Mr. Hill went into a frenzy. He ran into Mr. McGowan's cell and began violently beating him. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 21; Complaint, R. 1, PageID # 4.

Mr. Hill punched Mr. McGowan in the face, knocked him down onto his bed, and strangled him. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 21; Complaint, R. 1, PageID # 4. Mr. Hill told Mr. McGowan that he was about to kill Mr. McGowan for "snitching" on Mr. Carter. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 21. The assault lasted for several minutes and didn't stop until other detainees nearby warned Mr. Hill that a deputy was on the way. *Id.* When Mr. Hill finally ceased his onslaught and left Mr. McGowan's cell, Mr. McGowan closed his door and pressed an emergency button. *Id.* Mr. McGowan reported the assault to jail officials. *Id.*

In the aftermath of Mr. McGowan's attack, Mr. Hill was charged with assault and battery by the Berrien County Prosecutor's Office. Complaint, R. 1, PageID # 4; *see also* Complaint Ex. 4: Victim Services Letter, R. 1-4, PageID # 13. Mr. Hill pled guilty to the charge. Complaint, R. 1, PageID #4. For his part, Mr. Bell's work privileges were ultimately suspended. *Id.*

Mr. McGowan suffered extensive physical injuries to his head, neck, and body during the assault, including loss of vision in his left eye. *Id.* at PageID # 5; Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 23.

He continues to endure daily pain and loss of vision. Complaint, R. 1, PageID #5. The assault has also caused Mr. McGowan persistent anxiety, depression, and nightmares, which require a significant amount of prescription medication to treat (on top of medication prescribed to manage his physical pain). *Id.*; *see also* Complaint Ex. 5: Medication List, R. 1-5, PageID # 14. And Mr. McGowan continues to "liv[e] in a high state of fear, under constant threats of violence from other inmates." Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 23.[4]

II. Procedural History

Mr. McGowan filed suit *pro se* and *in forma pauperis*. He sued Ms. Herbert, in her official and personal capacities, and L. Paul Bailey—the sheriff of Berrien County who approved all of Ms. Herbert's actions relevant to this litigation—in his official capacity. Complaint, R. 1, PageID # 2; Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 23. Mr. McGowan alleged that Ms. Herbert and Mr. Bailey violated his Fourteenth Amendment rights by failing to protect him. Complaint, R. 1,

[4] As if these harms weren't enough, Mr. McGowan was also written up for disrupting the jail's "harmonious balance" after *he* was attacked by Mr. Hill. Complaint Ex. 3: Incident Report, R. 1-3, PageID # 12.

PageID # 3–6.[5] The district court (Magistrate Judge Phillip J. Green) dismissed all of Mr. McGowan's claims at the pre-service screening stage under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915A.[6]

The district court provided two reasons for finding that Mr. McGowan had not pled a plausible failure-to-protect claim, neither of which is correct. First, characterizing Mr. McGowan's concern as "his fear of assault from inmates who were previously housed in Dorm 2-E," the district court emphasized that Mr. McGowan did "not allege that the same inmates who were previously housed in Dorm 2-E and threatened him in April 2022 were housed there upon [his] return to that unit on June 13, 2022." Opinion, R. 5, PageID # 48. However, the district court

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[5] Mr. McGowan does not appeal the dismissal of his First Amendment, Fifth Amendment, Eighth Amendment, Fourteenth Amendment equal protection, and official-capacity claims. With respect to his Fourteenth Amendment failure-to-protect claims, Mr. McGowan appeals the dismissal of his claim premised on his removal from protective custody—he does not appeal the dismissal of his claim premised on Mr. Hill's placement into Dorm 2-E.

[6] Mr. McGowan consented to having all proceedings conducted by a magistrate judge. Complaint, R. 1, PageID # 6. As noted in the Statement in Support of Oral Argument, above, though defendants were not served, Mr. McGowan respectfully requests that they be required to appear in this appeal. *See, e.g.*, *Williams v. Hall*, 21-5540, R. 14-2, PageID # 1 (6th Cir. Jan. 20, 2022) (directing the defendant to file a responsive brief).

ignored Mr. McGowan's actual claim that "everyone" in Dorm 2-E—not just those who were previously housed there—knew that he had testified against Mr. Carter and that Mr. Carter had "put a price on [his] head," which any newcomer to Dorm 2-E could easily act on. Complaint Ex. 2, R. 1-2, PageID # 10. Second, the district court found it significant that Mr. McGowan "remained in Dorm 2-E without incident from June 13, 2022, until July 7, 2022," when Mr. Hill was placed in Dorm 2-E. Opinion, R. 5, PageID # 48.

After stating these reasons, the district court concluded that Mr. McGowan's complaint did not sufficiently allege that Ms. Herbert "acted intentionally to put him at a substantial risk of harm," and that his failure-to-protect claim would therefore be dismissed. *Id.* at PageID # 49.

The district court dismissed Mr. McGowan's complaint with prejudice for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b) and 42 U.S.C. § 1997e(c). *Id.* at PageID # 51; Judgment, R. 6, PageID # 53. However, it did "not conclude that any issue [Mr. McGowan] might raise on appeal would be frivolous," and thus refused to certify that an appeal would not be taken in good faith. Opinion, R. 5, PageID # 51–52.

SUMMARY OF THE ARGUMENT

Mr. McGowan alleged that he told Ms. Herbert that he was labeled a "snitch" for testifying against Mr. Carter, who "put a price" on his head; that he was threatened and assaulted for being a snitch before being placed in protective custody; and that "everyone" in Dorm 2-E knew that he was a snitch. Mr. McGowan also alleged that Ms. Herbert ignored his plea to remain in protective custody; intentionally placed him back in Dorm 2-E; and, as a result, Mr. Hill assaulted him for "snitching" on Mr. Carter. These allegations sufficiently state a Fourteenth Amendment failure-to-protect claim under this Court's recent decision in *Westmoreland v. Butler County*, 29 F.4th 721 (6th Cir. 2022). Yet, rather than engage in what should have been a straightforward analysis of Mr. McGowan's claim and allow it to move forward, the district court dismissed his claim, committing significant errors in the process.

First, the district court purported to identify two factors that defeated Mr. McGowan's failure-to-protect claim. But in doing so, the district court misconstrued Mr. McGowan's allegations to involve risks from only the Dorm 2-E detainees who had threatened him before he was placed into protective custody (rather than *all* Dorm 2-E detainees), and

gave weight to factors that are inapposite under the circumstances alleged. Moreover, to the extent the district court dismissed Mr. McGowan's claim for failing to allege that Ms. Herbert purposefully intended to put him at a substantial risk of harm, it erred by imposing a mental state requirement inconsistent with decades of precedent shaping and applying the deliberate-indifference standard.

Second, the district court erred by dismissing Mr. McGowan's complaint with prejudice, without affording him leave to amend. Even if the district court's analysis of Mr. McGowan's claim was correct, it should have allowed Mr. McGowan a chance to cure the supposed deficiencies in his complaint—an opportunity that this Court's precedent requires in cases like this, where amendment would not be futile.

For these reasons, this Court should reverse the district court's dismissal of Mr. McGowan's failure-to-protect claim or, in the alternative, vacate with instructions to allow Mr. McGowan leave to amend his complaint.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss for failure to state a claim under 28 U.S.C. §§ 1915(e) and 1915A and 42

U.S.C. § 1997e. *See Wershe v. Combs*, 763 F.3d 500, 505 (6th Cir. 2014); *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010). To state a claim under Section 1983, "a complaint must allege that persons acting under color of state law caused the deprivation of a federal statutory or constitutional right." *Small v. Brock*, 963 F.3d 539, 541 (6th Cir. 2020).

The standard governing dismissal for failure to state a claim under the PLRA is the same as under Federal Rule of Civil Procedure 12(b)(6). *See Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010); *see also Small*, 963 F.3d at 540–41. Under that standard, this Court "examine[s] whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Siefert v. Hamilton Cty.*, 951 F.3d 753, 759 (6th Cir. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when "'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' thus raising 'more than a sheer possibility that a defendant has acted unlawfully.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 440 (6th Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In engaging in this

inquiry, this Court may also consider the exhibits attached to Mr. McGowan's complaint. *See Nolan*, 991 F.3d at 707.

This Court must construe Mr. McGowan's complaint "in the light most favorable to him, accept his factual allegations as true, and determine whether he can prove any set of facts that would entitle him to relief." *Wershe*, 763 F.3d at 505. And it is well-established that *pro se* complaints, like Mr. McGowan's, "are to be held to less stringent standards than formal pleadings drafted by lawyers, and should therefore be liberally construed." *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (internal quotation marks omitted).

When a pretrial detainee's complaint is dismissed *sua sponte* under the PLRA, "the ordinary rules for allowing leave to amend the complaint still apply." *Lucas v. Chalk*, 785 F. App'x 288, 291 (6th Cir. 2019); *see also LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013). "[W]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003).

ARGUMENT

I. Mr. McGowan Stated A Fourteenth Amendment Claim For Failure To Protect Against Ms. Herbert.

As this Court confirmed just last year, in order for Mr. McGowan—a pretrial detainee—to state a failure-to-protect claim against Ms. Herbert, he had to allege that Ms. Herbert: (1) "act[ed] intentionally in a manner that"; (2) "put[] [him] at substantial risk of harm"; (3) "without taking reasonable steps to abate that risk"; and (4) by failing to do so, "actually cause[d] [his] injuries." *Westmoreland*, 29 F.4th at 729. Mr. McGowan's complaint clearly alleges each of these elements. The district court offered two reasons for dismissing Mr. McGowan's claim: that Mr. McGowan did not allege that the same detainees who threatened him before he was placed into protective custody were housed in Dorm 2-E upon his removal from protective custody, and that approximately three weeks passed from his return to Dorm 2-E until he was assaulted. *See* Opinion, R. 5, PageID # 48. Neither reason supports dismissal.

A. Mr. McGowan sufficiently alleged each of the required *Westmoreland* elements.

First, a plaintiff must plead that the defendant officer "made an intentional decision as to [his] conditions of confinement." *Westmoreland*, 29 F.4th at 729. Mr. McGowan did so. He alleged that Ms. Herbert—then

the Berrien County Jail classification officer—"forced [Mr. McGowan] to move out of protection" and put him back in Dorm 2-E. Complaint, R. 1, PageID # 4; *see also* Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 22 (same). By deciding to remove Mr. McGowan from protective custody, Ms. Herbert acted "deliberately (not accidently)," satisfying *Westmoreland*'s first prong. 29 F.4th at 728 (citing *Brawner v. Scott Cty.*, 14 F.4th 585, 596 (6th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022)); *accord Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (noting that an analogous failure-to-protect inquiry is satisfied where a "placement decision was intentional").

Second, a plaintiff must plead that "the conditions of confinement put [him] at substantial risk of suffering serious harm." *Westmoreland*, 29 F.4th at 729. Again, Mr. McGowan did so. This Court has already determined that "being identified as a 'snitch'"—as Mr. McGowan was—"puts an inmate at substantial risk of assault." *Id.* Furthermore, in *Comstock v. McCrary*, this Court acknowledged a prison psychologist's testimony that "a prisoner in prison definitely doesn't want to be labeled a snitch," and that being a "snitch" is "probably the worst label that you . . . could have put on you if you were in prison." 273 F.3d 693, 699 n.2

(6th Cir. 2001). As this Court recognized again several years later, "snitches are 'despised,'" their "li[ves] can be in danger," and "[e]verybody goes after a snitch." *United States v. Tilghman*, 332 F. App'x 269, 273 (6th Cir. 2009) (crediting quoted testimony). As yet another decision of this Court recognized, "murder is an understood consequence of testifying against another inmate and being labeled a 'snitch.'" *United States v. Gravley*, 587 F. App'x 899, 915 (6th Cir. 2014). District courts within the Sixth Circuit have repeatedly reached the same conclusion. *See, e.g.*, *Ball v. Evers*, 2021 WL 3164273, at *9 (E.D. Mich. July 27, 2021) ("It is widely understood that prisoners do not take kindly to those who report others to authorities."); *Spotts v. Hock*, 2011 WL 676942, at *2 (E.D. Ky. Feb. 16, 2011) ("If an inmate is believed to be a 'snitch' by other inmates, he or she faces a substantial risk of assault by other inmates.").[7] As have other federal circuits. *See, e.g.*, *Dale v. Poston*, 548 F.3d 563, 570 (7th Cir. 2008) ("[I]t's common knowledge that snitches face unique risks in

[7] *See also Sango v. Kinsey*, 2022 WL 2275714, at *3 (W.D. Mich. May 24, 2022), *report and recommendation adopted*, 2022 WL 2275016 (W.D. Mich. June 23, 2022); *Byrd v. Lee*, 2018 WL 3543702, at *5 (E.D. Tenn. July 23, 2018); *Branham v. Bolton*, 2017 WL 2312479, at *4 (W.D. Ky. May 26, 2017).

prison."); *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008) ("[A]n inmate who is considered to be a snitch is in danger of being assaulted or killed by other inmates."); *Miller v. Leathers*, 913 F.2d 1085, 1088 n.* (4th Cir. 1990) ("It is impossible to minimize the possible consequences to a prisoner of being labeled a 'snitch.'").

The detainees housed in Dorm 2-E labeled Mr. McGowan a "snitch" for testifying against Mr. Carter. Complaint, R. 1, PageID # 3–4; Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10. That label did more than just "make [Mr. McGowan] a target for . . . attacks," *Comstock*, 273 F.3d at 699 n.2—it caused Mr. McGowan to *actually* be assaulted, repeatedly, by detainees in Dorm 2-E before he was placed in protective custody.[8] Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10. Not only did "everyone" in Dorm 2-E consider Mr. McGowan a snitch, but Mr. Carter (who was ultimately convicted of a double homicide) "put a price on [Mr. McGowan's] head," further incentivizing Dorm 2-E detainees to assault, and kill, Mr. McGowan. *Id.* Ms. Herbert's decision to remove Mr.

[8] Even the plaintiff in *Westmoreland*, who this Court held was put at substantial risk of assault for being identified as a "snitch," had not been previously assaulted because of that label. *See* 29 F.4th at 724–25, 729.

McGowan from protective custody and place him back in Dorm 2-E—where he was universally known as a snitch and had been repeatedly physically assaulted as a result—undoubtedly "put[] [Mr. McGowan] at substantial risk of harm." *Westmoreland*, 29 F.4th at 729.

Third, "viewing the facts in the light most favorable" to Mr. McGowan, Ms. Herbert was deliberately indifferent to the substantial risk that serious harm would come to Mr. McGowan if he were removed from protective custody and returned to Dorm 2-E. *Id.* at 730. Ms. Herbert was undoubtedly aware of the substantial risk of serious harm that Mr. McGowan faced. In the affidavit that Mr. McGowan sent to Ms. Herbert in May 2022, Mr. McGowan "begged and pleaded" to remain in protective custody. Complaint, R. 1, PageID # 3. He told Ms. Herbert that (1) "everyone" in Dorm 2-E knew that he was a snitch, (2) Mr. Carter had "put a price on [his] head," (3) detainees in Dorm 2-E had repeatedly assaulted him for testifying against Mr. Carter, and (4) he would be "assaulted or killed" if removed from protective custody. Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10. Under these circumstances, a jury could certainly find that a "*reasonable* officer" would have "appreciated the high degree of risk involved and the obvious

consequences" of returning Mr. McGowan to Dorm 2-E. *Westmoreland*, 29 F.4th at 730 (emphasis in original). By failing to keep Mr. McGowan in protective custody and, instead, placing him back in Dorm 2-E, Ms. Herbert recklessly disregarded that risk. *Cf. Scott v. Miami Dade Cty.*, 657 F. App'x 877, 884 (11th Cir. 2016) (holding that a jury could find that jail officials responded objectively unreasonably by permitting a pretrial detainee, who had been labeled a "snitch," to be in close proximity with another detainee who subsequently assaulted him).

Fourth, Ms. Herbert's failure to keep Mr. McGowan in protective custody caused his injuries. After Ms. Herbert removed Mr. McGowan from protective custody and returned him to Dorm 2-E, Mr. McGowan was savagely beaten by Mr. Hill. Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 21. Mr. Hill attacked Mr. McGowan because he knew that Mr. McGowan had testified against Mr. Carter. *Id.* at PageID # 20–21. He even told Mr. McGowan during the assault that he was going to kill him for "snitching" on Mr. Carter. *Id.* at PageID # 21. As a result of not being kept in protective custody, Mr. McGowan subsequently suffered physical injuries to his head, neck, and body (including loss of vision in one eye), as well as mental and emotional harms. Complaint, R. 1,

PageID #5; Complaint Ex. 11: McGowan Affidavit, R. 1-11, PageID # 23. These allegations plainly satisfy the final element of Mr. McGowan's claim. *See Westmoreland*, 29 F.4th at 730 (holding that this fourth element was established by the plaintiff's showing that he was labeled a "snitch," was not separated from other detainees who identified him as a snitch, and was subsequently attacked and suffered a broken jaw).

Under this Court's precedent, Mr. McGowan has stated a failure-to-protect claim under the Fourteenth Amendment against Ms. Herbert. The district court thus erred in dismissing that claim.

B. The district court improperly focused on factors that are inapplicable or irrelevant to Mr. McGowan's claim.

Rather than routinely apply the *Westmoreland* standard, the district court instead emphasized two bases which it claimed defeated Mr. McGowan's failure-to-protect claim. The district court provided no authority to support either contention, and neither properly applies to or bears on Mr. McGowan's claim.

First, the district court stated that, "[a]lthough it is clear that [Mr. McGowan] would have preferred to remain in protective custody because of his fear of assault from inmates who were previously housed in Dorm 2-E," Mr. McGowan failed to allege "that the same inmates who were

previously housed in Dorm 2-E and threatened him in April 2022 were housed there upon [his] return to that unit on June 13, 2022." Opinion, R. 5, PageID # 48. But the district court mischaracterized Mr. McGowan's fear and the resulting risk of harm. Mr. McGowan told Ms. Herbert that he could not be housed in Dorm 2-E because "*everyone*" there knew that he "gave information on Carter." Complaint Ex. 2: McGowan Affidavit, R. 1-2, PageID # 10 (emphasis added). And Mr. Carter had gone so far as to "put a price on [Mr. McGowan's] head"—a call to arms encouraging any and all detainees to harm Mr. McGowan. *Id.* Mr. McGowan's fear was not merely that the specific individuals who had previously threatened and assaulted him would do so again—his fear was that *any* detainee housed in Dorm 2-E (including newcomers) would attempt to kill him because he was known as a snitch.

Mr. McGowan's fears were not unfounded, as the cases identified above regarding the consequences of being labeled a "snitch" make clear. *See supra* 16–18 & n.7. Knowledge of Mr. McGowan's role in Mr. Carter's criminal case was widespread—it would have been quite easy for a detainee recently placed in Dorm 2-E (like Mr. Hill) to find out that Mr. McGowan was a snitch. Indeed, as the U.S. Department of Justice has

long recognized, "in small correctional systems, where notoriety is easy to gain and hard to lose, many inmates will never lose their 'snitch' label" and "will never be able to leave [protective custody] status." U.S. Department of Justice: National Institute of Corrections, *Protective Custody Management in Adult Correctional Facilities* at 11 (1990), https://www.ojp.gov/pdffiles1/Digitization/134060NCJRS.pdf. And the incentive to assault Mr. McGowan grew even larger by Mr. Carter putting a "price" on Mr. McGowan's head, a bounty that any newcomer might want to earn. Accordingly, even if the particular detainees who had threatened and assaulted Mr. McGowan before he was placed into protective custody were no longer housed in Dorm 2-E when he returned, the substantial risk of harm he faced as a result of being identified as a snitch remained.

The type of reasoning underlying the district court's opinion here was rejected by this Court in *Williams v. McLemore*. In *Williams*, a prisoner was placed in protective custody after providing a note to prison officials stating that he "ha[d] enemies" in the prison and "feared for his life." 247 F. App'x 1, 2–3 (6th Cir. 2007). The note also identified two specific individuals as the plaintiff's enemies. *Id.* at 3 n.1. After the

plaintiff was forced out of protective custody and into the general population, he was stabbed by an unknown assailant. *Id.* at 4. The plaintiff brought failure-to-protect claims against the prison officials who, on appeal, argued that they were entitled to summary judgment because the plaintiff "ha[d] not shown that he was attacked by either of the two enemies that [he] identified" in his note. *Id.* at 12. This Court disagreed, holding that the identity of the plaintiff's assailant was irrelevant. *Id.* at 13.

In reaching this conclusion, this Court relied on the established principle that a defendant cannot "escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 12 (quoting *Farmer v. Brennan*, 511 U.S. 825, 843 (1994)). This is true especially where the substantial risk of harm is based on a characteristic of the detainee, *see, e.g.*, *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004); *Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 84 (6th Cir. 1995), such as being labeled a "snitch," *see Westmoreland*, F.4th at 729.

As in *Williams*, where the plaintiff could not even identify his assailant after the fact, it makes no difference that Mr. McGowan was assaulted by a detainee who had not previously threatened or assaulted him (and who, in fact, was new to Dorm 2-E). What matters is that Mr. McGowan was labeled a "snitch," everyone in Dorm 2-E knew him as a snitch, and there was a bounty on his head. Returning Mr. McGowan to Dorm 2-E meant subjecting him to substantial risk of harm.

Second, the district court relied on the fact that Mr. McGowan "remained in Dorm 2-E without incident from June 13, 2022, until July 7, 2022"—suggesting that 24 days is somehow too long a gap to establish a connection between Mr. McGowan's return to Dorm 2-E and the injuries he sustained. Opinion, R. 5, PageID # 48. That is incorrect.

This Court has already allowed a failure-to-protect claim to proceed where an even longer gap existed between the defendant's action and the plaintiff's injury. In *Williams*, this Court affirmed the denial of summary judgment with respect to a failure-to-protect claim against a prison warden where the plaintiff was stabbed by another prisoner 30 days after being forced to return from protective custody to the prison's general population. 247 F. App'x at 3–4, 13. The fact that the assault occurred

"[n]early one month later" than the decision to return the prisoner to the general population had no bearing on this Court's failure-to-protect analysis. *Id.* at 4.

Other circuit courts are in accord, allowing failure-to-protect claims alleging significantly similar circumstances—but with far longer gaps—to proceed. In *Caldwell v. Dallas County*, for example, the Fifth Circuit vacated dismissal of a prisoner's claim where "the feared attack occurred" "less than three months" after a convicted prisoner informed prison officials that he feared being assaulted due to being a snitch. 162 F.3d 96, 1998 WL 771339, at *1 (5th Cir. Oct. 23, 1998). Similarly, in *Hamilton v. Leavy*, the Third Circuit reversed the district court's order granting summary judgment in favor of prison officials where a convicted prisoner who had been labeled a "snitch" was assaulted "less than two months" following the officials' decision not to place him into protective custody. 117 F.3d 742, 747–748 (3d Cir. 1997). The 24-day period at issue here is well shorter than the months-long periods in those cases.

Moreover, a pretrial detainee's fear of being physically assaulted for being identified as a snitch is unique. As discussed, the "snitch" label puts a detainee in grave danger and will often be associated with the detainee

for the duration of their incarceration, renewing each time a newcomer finds out they are a snitch. And that is exactly what happened here. Though Mr. Hill was new to Dorm 2-E on July 7, it took him only a few hours to find Mr. McGowan, confirm that he had testified against Mr. Carter, and brutally assault him for being a snitch. Complaint Ex. 11, R. 1-11, PageID # 20–21. The timing between Ms. Herbert's decision and Mr. Hill's assault of Mr. McGowan is thus irrelevant under the circumstances at issue here.

The district court's specific reasons for finding that Mr. McGowan failed to state a failure-to-protect claim miss the mark. Mr. McGowan's allegations track *Westmoreland*'s elements and go beyond what is necessary to survive dismissal for failure to state a claim. This is particularly so given the liberal construction afforded to *pro se* complaints, like Mr. McGowan's. *Cf. Johnson v. Bouldin*, 2022 WL 969035, at *8 (E.D. Tenn. Mar. 30, 2022) (citing *Westmoreland* and allowing an Eighth Amendment failure-to-protect claim to proceed for further factual development based on the plaintiff's "fairly conclusory" allegations that he told the defendant "about the snitch label, threats,

and verbal abuse from other inmates"). This Court should thus reverse the district court's dismissal of Mr. McGowan's claim.

C. To the extent the district court required Mr. McGowan to allege Ms. Herbert's purposeful mental state, it erred.

Confusingly, after identifying the two inapposite grounds discussed above as bases for dismissing Mr. McGowan's failure-to-protect claim, the district court then stated that it was dismissing that claim because Mr. McGowan had not alleged that Ms. Herbert "acted intentionally to put him at a substantial risk of harm." Opinion, R. 5, at PageID # 49. But, of course, Mr. McGowan was not required to allege that Ms. Herbert intended *to put him at harm*—he was only required to allege that Ms. Herbert "act[ed] intentionally *in a manner that* put[] [him] at substantial risk of harm." *Westmoreland*, 29 F.4th at 729 (emphasis added).

This distinction matters. As this Court recognized in *Westmoreland*, "a pretrial detainee establishes deliberate indifference by proving 'more than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.* at 728 (quoting *Brawner*, 14 F.4th at 596–97). This is exactly why this Court, in *Brawner*, required a pretrial detainee asserting an adequate medical care claim to prove that

the defendant's physical act was intentional and, separately, that the defendant either "acted intentionally to ignore [the detainee's] serious medical need" *or* "recklessly failed to act reasonably to mitigate the risk of the serious medical need posed to [the detainee]." *Brawner*, 14 F.4th at 597 (citing *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) ("A detainee must prove that an official acted intentionally *or* recklessly, and not merely negligently." (emphasis added))). While a purposeful mental state is sufficient, it is not necessary to establish deliberate indifference.[9]

To the extent the district court dismissed Mr. McGowan's claim for failing to allege that Ms. Herbert "acted intentionally to put him at a substantial risk of harm," it imposed a requirement that this Court—nor any other federal court—has ever required in the deliberate indifference context. Such a conclusion would certainly constitute error.

[9] Even before *Brawner* articulated a more lenient deliberate indifference standard for pretrial detainees asserting Fourteenth Amendment claims (as opposed to claims brought by convicted prisoners under the Eighth Amendment), pretrial detainees still were not required to allege purposeful intent. *See, e.g.*, *Farmer*, 511 U.S. at 836 ("[D]eliberate indifference l[ies] somewhere between the poles of negligence at one end and purpose or knowledge at the other.").

II. Alternatively, The District Court Should Have Afforded Mr. McGowan An Opportunity To Amend His Complaint.

Even if the district court had correctly dismissed Mr. McGowan's failure-to-protect claim because he did not allege that the detainees who threatened him were housed in Dorm 2-E before and after his period in protective custody, it should have given Mr. McGowan the opportunity to amend his complaint. Had it done so, Mr. McGowan could have included the type of allegation the district court (wrongly) thought was missing.

This Court has long held that "a plaintiff *must* be given at least one chance to amend the complaint before the district court dismisses the action with prejudice," where a "more carefully drafted complaint might state a claim." *Bledsoe*, 342 F.3d at 644 (emphasis added); *see also Southwell v. Summit View of Farragut, LLC*, 494 F. App'x 508, 513 (6th Cir. 2012) (reversing and remanding where a plaintiff had not been given her "one chance" to amend her complaint and substantiate her claim); *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (reversing and remanding to allow a plaintiff the opportunity to state a valid claim). Moreover, plaintiffs should be afforded the opportunity to amend even if they have failed to request leave to amend before dismissal, particularly where the plaintiff was unaware that her complaint was deficient. *See*

Bledsoe, 342 F.3d at 644–45. In short, if it is "at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Brown v. Matauszak*, 415 F. App'x 608, 614 (6th Cir. 2011).

The district court dismissed Mr. McGowan's *pro se* complaint *sua sponte* and with prejudice. Judgment, R. 6, PageID # 53. But had the district court allowed Mr. McGowan a chance to amend his complaint, he could have alleged that at least one detainee who threatened and attempted to physically assault him before he was moved to protective custody was still housed in Dorm 2-E when he returned (and that he reported that attempted assault to jail officials). These allegations would have cured the complaint's supposed deficiency.

Additionally, Mr. McGowan should have been permitted to amend his complaint to state a claim against Mr. Bailey in his individual capacity. The district court dismissed the claims against Mr. Bailey (including the failure-to-protect claim on appeal) because he had been sued in his official capacity only. Opinion, R. 5, PageID # 41–43. But the record establishes that Mr. Bailey "approved all [Ms.] Herbert's action[s] dealing with this matter." Complaint Ex. 11: McGowan Affidavit, R. 1-

11, PageID # 23. Suing Mr. Bailey in his individual capacity would thus have been proper, and dismissal of the failure-to-protect claim against him should have been without prejudice. *See Brown*, 415 F. App'x at 614–15 (dismissal without prejudice is warranted "[p]articularly where deficiencies in a complaint are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements"); *see also, e.g.*, *Burley v. Knickerbocker*, 2019 WL 3330804, at *4 (E.D. Mich. Apr. 24, 2019) (recommending that a *pro se* prisoner be allowed to amend his complaint to add individual capacity claims against various defendants because "the requested amendment is not motivated by bad faith and would not unduly prejudice Defendants"), *report and recommendation adopted*, 2019 WL 2610895 (E.D. Mich. June 26, 2019).

The fact that Mr. McGowan's complaint was dismissed at the pre-service screening stage under the PLRA has no bearing on whether he should have been given an opportunity to amend—if anything, it demonstrates that the defendants could not possibly be prejudiced by such amendment. Indeed, this Court has recognized that "the ordinary rules for allowing leave to amend the complaint still apply" in the PLRA context. *Lucas*, 785 F. App'x at 291; *cf. Jones v. Bock*, 549 U.S. 199, 214

(2007) ("[T]he PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself."). In *Lucas*, for instance, this Court vacated and remanded after "identify[ing] a crucial factual assertion that, if pled, would have saved the original pro se complaint from sua sponte dismissal." 785 F. App'x at 292; *see also, e.g.*, *Williams v. Weirich*, 2022 WL 14915623, at *5–6 (W.D. Tenn. Oct. 26, 2022) (granting leave to amend a *pro se* complaint dismissed *sua sponte* under the PLRA, where amendment would not be futile); *Brooks v. Corr. Officer*, 2022 WL 4826325, at *10 (W.D. Tenn. Oct. 3, 2022) (same). Thus, even if the district court's analysis were correct, it should have allowed Mr. McGowan his "one chance" to amend. *Bledsoe*, 342 F.3d at 644.

CONCLUSION

Ms. Herbert knew that Mr. McGowan had been labeled a "snitch" by the detainees in Dorm 2-E. She knew that Mr. Carter had "put a price" on Mr. McGowan's head. She knew that Mr. McGowan was significantly at risk of being attacked, or even killed, as a result. And she even knew that Mr. McGowan had previously been threatened and physically assaulted by other detainees while being housed in Dorm 2-E. Any

reasonable officer under the circumstances would have understood and appreciated that returning Mr. McGowan to Dorm 2-E endangered him and would subject him to further physical harm. By removing Mr. McGowan from protective custody and placing him back into Dorm 2-E, Ms. Herbert recklessly disregarded that risk, in violation of the Fourteenth Amendment.

Had the district court properly applied this Court's *Westmoreland* decision, it would have reached the same result. Instead, it misapplied *Westmoreland* and focused on factors that do not warrant dismissal of Mr. McGowan's failure-to-protect claim. For these reasons, this Court should reverse the district court's dismissal of Mr. McGowan's claim and allow this case to move past the PLRA screening stage. Alternatively, this Court should vacate the dismissal with instructions to allow Mr. McGowan leave to amend his complaint.

Dated: January 23, 2023

Respectfully submitted,

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Dated: January 23, 2023

/s/ *Evan Bianchi*
Evan Bianchi

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I electronically filed the foregoing document through the Court's electronic filing system, and that it has been served on all counsel of record through the Court's electronic filing system.

/s/ *Evan Bianchi*
Evan Bianchi

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Western District of Michigan, Case No. 1:22-cv-852

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